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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 638

JOHN MELLON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the circuit court of appeals (R. 212-213) is reported at 165 F. 2d 80.

JURISDICTION

The judgment of the circuit court of appeals was entered December 15, 1947 (R. 213), and a petition for rehearing was denied January 7, 1948 (R. 219). On January 29, 1948, Mr. Justice Jackson extended to March 5, 1948, petitioner's time to file a petition for a writ of certiorari (R. 220), and the petition was filed March 3, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to sustain petitioner's conviction on a charge of causing a bond to be falsely made for the purpose of defrauding the United States.

2. Whether there is sufficient independent evidence to corroborate petitioner's extrajudicial admissions.

3. Whether the trial court erred in permitting counts three, five and seven to go to the jury, when the state of the evidence was such that the court thereafter set aside the verdict of guilty as to those counts.

STATUTE INVOLVED

Section 28 of the Criminal Code (18 U.S.C. 72) provides in pertinent part:

> Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid, or assist in the false making, altering, forging, or counterfeiting, any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States * * * shall be fined not more than $1000, or imprisoned not more than ten years, or both.

STATEMENT

A seven-count indictment was returned against petitioner and one Salerno in the District Court for the Eastern District of New York (R. 6-30). The first count charged that on or about February 20, 1940, petitioner and Salerno "did forge, and counsel to be forged, and cause to be forged" the signature "Charles D. Martineau" on the appeal bond of one Michael Pecoraro, in violation of Section 28 of the Criminal Code (18 U.S.C. 72). The third count charged that petitioner

and Salerno caused a false affidavit to be made in connection with the appeal bond, in which it was represented that Salerno was "Charles D. Martineau" and that he owned property at 56-58 South 9th St., Brooklyn, N. Y.; this was alleged to be a violation of Section 35(A) of the Criminal Code (18 U.S.C. 80). The fifth count charged that petitioner and Salerno "did take or cause to be taken" by Salerno a false oath in connection with the filing of the appeal bond, in violation of Section 125 of the Criminal Code (18 U.S.C. 231).[1] The seventh count alleged a conspiracy between petitioner and Salerno to commit the offenses charged in counts 1, 3, and 5 (Section 37 of the Criminal Code, 18 U.S.C. 88). Prior to trial, the Government was granted a severance as to Salerno (R. 32).

After a jury trial, petitioner was found guilty on counts 1, 3, 5, and 7 (R. 168). However, when he appeared for sentence two weeks later, the court granted a judgment of acquittal as to counts three, five and seven for insufficiency of evidence. Petitioner was then sentenced to two years' imprisonment on the first count, but execution of the sentence was suspended and he was placed on probation for five years. (R. 172-176.) The judgment was affirmed by the Circuit Court of Appeals for the Second Circuit (R. 213).

The evidence for the Government may be briefly summarized as follows:

United States Commissioner Fay testified that on February 20, 1940, a man who said he was Charles D. Martineau appeared before him, executed an appeal bond for Pecoraro under oath in the name of Martineau, submitted an

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[1] The second, fourth and sixth counts charged offenses of the same nature as the first, third and fifth, but in connection with the appeal bond of one Sam Gross. The second, fourth and sixth counts were dismissed by the court at the close of the Government's case for insufficiency of evidence (R. 101-103).

affidavit to the effect that he, as Martineau, was the owner of property at 56-58 South 9th Street, Brooklyn, New York, and handed to the Commissioner the deed and receipted tax bill for the property (R. 41-43).

George La Fante testified that he was also known as Charles D. Martineau; that he bought the property at 56-58 South 9th Street together with petitioner and title was taken in the name of Martineau; that he did not have the deed or the tax receipts in his possession on February 20, 1940, nor did he know who had them or where they were; that the signatures on the bond were not executed by him and could not have been so executed because he was in prison on February 20, 1940; and that he had not authorized anyone to present the deed and tax receipts to the commissioner and execute the appeal bond for Pecoraro, nor had he ever discussed the matter with petitioner (R. 44-49, 146-147).

Ralph Lewis, an F.B.I. agent, testified that petitioner stated to him on December 14, 1944, that he was a very close friend of Pecoraro; that he was the actual owner of the property at 56-58 South 9th Street; that some time in February 1940, prior to the 13th, he made arrangements with a man whom he refused to identify to take the deed and the tax receipts to the proper place and execute, in the name of "Charles D. Martineau," all the papers necessary to arrange bond for Pecoraro's release pending his appeal (R. 88-97, 149-152). This testimony was corroborated in part by witnesses Simmons (R. 78-80) and Feldman (R. 81-84).

ARGUMENT

1. We think it obvious that there was abundant evidence to support petitioner's conviction if the evidence of his admissions was competent and relevant.

Petitioner argues (Pet. 11-12) that this evidence is not relevant because, as he says, it referred to some bond executed prior to February 13, 1940, whereas the indictment charged execution on or about February 20, 1940. The testimony of the Government witnesses, however, was that petitioner admitted that he had *made arrangements* prior to February 13, 1940, for the execution of an appeal bond for Pecoraro. Petitioner also argues (Pet. 12-13), if we understand him correctly, that he could not have aided and abetted the forging of the appeal bond prior to February 13, because Pecoraro was not sentenced until February 14 and the order admitting him to bail was not entered until February 20. But it is obvious that the forgery could have been committed in pursuance of petitioner's previous directions.

2. Petitioner contends (Pet. 14-15) that the evidence of his admissions was not competent because it was not sufficiently corroborated by independent evidence. It is, however, well established that the independent evidence of the corpus delicti need not be "so full and complete as to establish unaided the commission of a crime. It is sufficient if the extrinsic circumstances, taken in connection with the defendant's admission, satisfy the jury of the defendant's guilt beyond a reasonable doubt." *Jordan* v. *United States,* 60 F. 2d 4, 5 (C.C.A. 4), certiorari denied, 287 U. S. 633; see also *Warszower* v. *United States,* 312 U. S. 342, 345; *United States* v. *Kertess,* 139 F. 2d 923, 929 (C.C.A. 2), certiorari denied, 321 U. S. 795; *Evans* v. *United States,* 122 F. 2d 461, 465 (C.C.A. 10), certiorari denied, 314 U. S. 698; *Ryan* v. *United States,* 99 F. 2d 864, 870 (C.C.A. 8), certiorari denied, 306 U. S. 635; *Forte* v. *United States,* 94 F. 2d 236, 240 (App. D. C.); *Daeche* v. *United States,* 250 Fed. 566, 571 (C.C.A. 2). And "proof of the identity of the perpetrator of the act or crime is not a

part of the corpus delicti." *United States* v. *Di Orio*, 150 F. 2d 938, 939 (C.C.A. 3), certiorari denied, 326 U. S. 771; see also *George v. United States*, 125 F. 2d 559, 563 (App. D. C.); *Anderson v. United States*, 124 F. 2d 58, 66 (C.C.A. 6), reversed on other grounds, 318 U. S. 350; *Ryan* v. *United States, supra.*

Here the commissioner testified that someone executed the bond as "Martineau," and La Fante, who held title to the property as "Martineau," testified that he had not authorized anyone to put up the property as collateral in that name. Petitioner makes much of the fact that La Fante signed a statement, addressed "to whom it may concern," to the effect that anything petitioner did with the property was "all right" with him. This statement, made on March 26, 1945, over five years after the execution of the Pecoraro bond and about six weeks after petitioner's indictment (see R. 1), and made moreover in response to a request by petitioner or his lawyer (R. 62-64, 67-71), is offset by La Fante's positive testimony at the trial that he did not authorize the use of the name "Martineau" on the bond (R. 48-49, 66, 147).

3. Petitioner contends (Pet. 16-18) that "in view of the paucity of evidence * * *, even as to Count One," the trial court committed prejudicial error in submitting to the jury counts three, five and seven, upon which the court directed that petitioner be acquitted after the jury had rendered a verdict of guilty. All the evidence offered and admitted, however, was relevant to prove the charge of count 1 as to petitioner. And by his own admission, he directed someone to sign the bond as "Martineau." In view of the overwhelming evidence of his guilt on count 1, petitioner was not prejudiced by the submission of the other counts to the jury.

CONCLUSION

The decision of the circuit court of appeals is correct, and no conflict of decisions is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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March 1948.

U. S. GOVERNMENT PRINTING OFFICE, 1948